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NO. 81-142

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

GARY STANKOWSKI
Petitioner

v.

STATE OF CONNECTICUT
Respondent

Petition For A Writ Of Certiorari To The Supreme Court For The State Of Connecticut

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QUESTIONS PRESENTED

I. Whether the Connecticut Supreme Court erred in approving an instruction to the trial jury on the issue of intent that "every person is presumed to intend the natural and necessary consequences of his acts" as that instruction to the trial jury impermissibly shifted the burden of proof to the Petitioner and thereby violated his constitutional protection of the presumption of innocence and the due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

II. Whether the Connecticut Supreme Court erred in approving the Trial Court's exclusion of exculpatory, relevant and material evidence of a defense witness.

III. Whether the Connecticut Supreme Court erred in approving the admission of unwarned statements of the Petitioner when uttered in a custodial situation and when there was a substantial issue as to their voluntariness.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court for the State of Connecticut entered in this proceeding on May 12, 1981, rehearing denied May 28, 1981.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at XLII Conn. L.J. No. 46 at 5 (May 12, 1981) and appears in Petitioner's Appendix along with the Connecticut Supreme Court's Order dated May 28, 1981, denying a rehearing. Also reprinted in the Appendix are the Petitioner's Motion for Reargument in the Connecticut Supreme Court and Motion to Suppress Evidence in the Trial Court along with relevant portions of the instructions to the jury and statements of the Petitioner's read to the jury over his objections, all of which are relevant to the issues raised herein.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on May 12, 1981 and a timely Motion for Rehearing was filed. An order denying a rehearing was issued on May 28, 1981. The Petition for Certiorari was filed within sixty (60) days of the judgment on May 28, 1981. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless or a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes (Revision of 1968), Section 53a-54a:

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation of excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a Class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a.

STATEMENT OF THE CASE

The Petitioner, Gary Stankowski, was arrested for murder on August 25, 1977, and on September 28, 1977 was indicted for murder, in violation of Conn. Gen. Stat. Section 53a-54a(a).

On April 4, 1978, the Petitioner filed a Motion to Suppress Oral Statements taken from him by the Connecticut State Police. The motion was heard at the time that the oral statements were offered as evidence during his trial, which motion was denied by the Trial Court on April 21, 1978. See Appendix (5), p. 45A and Appendix (6), p. 47A. A jury of twelve returned a verdict of guilty as charged in the indictment. On June 29, 1978 the Petitioner was sentenced to prison for a term of not less than twelve and one-half years, nor more than life. On July 17, 1978 the Petitioner filed a timely appeal to the Connecticut Supreme Court which Court affirmed his conviction on May 12, 1981 and denied a rehearing on May 28, 1981. See Appendix (1) and Appendix (2).

On the evening of August 25, 1977, at about 11:45 P.M., the Colchester State Police Barracks received a phone call that an accident had taken place at the Stankowski residence on Falls Road in the Town of Moodus. The State Police found the Petitioner in an extremely distraught condition, evidencing an intent to take his own life with a razor blade. The Petitioner was subdued, handcuffed and strapped face down onto a stretcher, where he remained until transported to the Colchester Barracks by Trooper Horan. A State Police sergeant testified that in his opinion the Petitioner was under the influence of alcohol. Other witnesses testified that all of the people present at the Petitioner's residence were drinking and smoking "pot". The Petitioner and the decedent and a group of young people had spent the evening together and in the course of the evening had ingested a large amount of alcohol and smoked marijuana. They ended up in a loft over the Petitioner's

garage. An eyewitness to the shooting testified that prior to the shooting, he and the Petitioner forced open a door to a shed and took two guns upstairs. The gun discharged while the decedent was holding the barrel and the Petitioner had the gun in his hands.

The Petitioner took the stand in his own defense and testified that once he brought the shotgun upstairs, he handed it to the deceased. He further testified that he did not know if the gun was cocked or uncocked at the time it was handed to the deceased; and that while she was holding the shotgun by the barrel the gun exploded and discharged. The State provided testimony at trial which showed that the projectile which killed the victim was rising, and it was probable that the gun was below the victim at the time of firing. This testimony is consistent with the Petitioner's version of the accident. The Petitioner then ran to the house and told his mother he had accidentally shot a girl.

The evidence at trial revealed that about 2:45 a.m. on August 26, 1977, blood was obtained from the defendant, which blood contained 0.15 ethyl alcohol by weight. The State-offered testimony of a toxicologist indicated that the defendant's blood level at about midnight would have been 0.21. Testimony from the police officers who first arrived at the scene identified that the defendant was under the influence of alcohol and/or drugs, and was in traumatic shock over the incident that had just happened. He repeatedly stated to the police that the shooting was an accident. State Trooper Horan testified that he remembered many exculpatory remarks to the Petitioner, but he could not recall bringing them to the attention of his superiors. Trooper Horan testified that the Petitioner told him that "he didn't know the gun was loaded."

At the close of the State's case, the Petitioner made an offer of proof concerning his witness, Stephen Stankowski. Stephen Stankowski would have testified that he, unbeknownst to the Petitioner had loaded the

shotgun in question, which evidence was highly exculpatory in nature. Prior to said offer, the Petitioner's father, Frank Stankowski, testified that he and his grandson, Stephen Stankowski, had a conversation subsequent to the incident in question, wherein Stephen showed him how he had obtained a shotgun shell from the unlocked shed and placed the same in the barrel of the shotgun approximately one week prior to this incident. He further testified that the unloaded gun had been placed in the locked shed by the Petitioner shortly after Stephen's actions, and that it had remained there until the night of the August 25, 1977 incident.

The witness, Stephen Stankowski, was examined by one Dr. Mark Kaplan, a well qualified clinical psychologist. Dr. Kaplan testified that he had examined Stephen and found that he had a good comprehension of the English language; that he understood the difference between telling the truth and telling a lie; and that he was capable of remembering concrete facts. Dr. Kaplan further testified that within the context of an average six year old male, Stephen Stankowski was of average maturity, capable of receiving concrete impressions, able to recollect and narrate intelligently, and was strongly motivated to tell the truth. The Trial Court excluded this testimony on the basis of an evidentiary ruling. The Connecticut Supreme Court did not address itself to the constitutional issues. See *State v. Stankowski*, XLII, Conn. L.J. No., 465 at pp. 11-12, Appendix (1), pp. 14A-15A and Petitioner's Motion for Reargument, Appendix (4), p. 43A.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Connecticut Supreme Court concerning the Trial Court's Charge to the Jury on the issue of intent is probably not in accord with the applicable decision of this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and the Connecticut Supreme Court's approval of the Trial Court's exclusion of the testimony of a defense witness is probably not in accord with the applicable decisions of this Court in *Washington v. Texas*, 388 U.S. 14 (1967) and *United States v. Nixon*, 418 U.S. 683 (1974) and the Connecticut Supreme Court's approval of the Trial Court's admission of the Petitioner's statements made while in custody is probably not in accord with the decisions of this Court in *Culombe v. Connecticut*, 367 U.S. 568 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

I. THE CONNECTICUT SUPREME COURT ERRED IN APPROVING INSTRUCTIONS TO THE TRIAL JURY ON THE ISSUE OF INTENT THAT "EVERY PERSON IS PRESUMED TO INTEND THE NATURAL AND NECESSARY CONSEQUENCES OF HIS ACTS" AS THOSE INSTRUCTIONS IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE PETITIONER, VIOLATING HIS PRESUMPTION OF INNOCENCE AND INVADING THE FACT-FINDING FUNCTION OF THE JURY.

The Connecticut Supreme Court approved the Trial Court's instruction to the jury on four separate occasions that "every person is presumed to intend the natural and necessary consequences of his acts." The relevant portions of the charge are set forth in Appendix (3). In the Petitioner's case, intent was the critical issue, and the Court so stated to the jury in connection with its charge. See Appendix (3), pp. 36A,

41A-42A. In fact, the Petitioner's case hinged on the issue of intent, and the Connecticut Supreme Court noted that "...there was not overwhelming evidence to support the finding of the requisite intent, and thus the defendant's guilt...". *State v. Stankowski*, 42 Conn. L.J. No. 36 P. 5 at 7 (May 12, 1980), Appendix (1), p. 6A.

The Trial Court's instruction on intent, an essential element of the crime of murder, that "the law presumes that person intends the ordinary consequences of his acts" violates the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States by shifting the burden of proof to the accused on the issue of intent. *Sandstrom v. Montana*, 442 U.S. 510 (1979). The invalidity of this instruction was recognized by the Connecticut Supreme Court by its reversal of *State v. Moye*, 177 Conn. 487, 418 A.2d 870 (1979), cert. granted, judgment vacated and remanded No. 79-274, 48 U.S.L.W. 3240 (Oct. 9, 1979), and reversed in 41 Conn. L.J. No. 25, p. 14 (12/18/79). This type of instruction on intent had previously been expressly disapproved by this Court in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *Morissette v. United States*, 342 U.S. 246 (1952). However, the Connecticut Supreme Court approved this type of instruction in *Moye, supra*, rejecting the constitutional arguments later mandated by *Sandstrom, supra*.

In the Petitioner's trial, the repeated instructions on intent infringed on his right to a jury determination on the issue of intent and the State's duty to prove it beyond a reasonable doubt. See *Sandstrom, supra, U.S. Gypsum Co., supra*, and *In re Winship*, 397 U.S. 358 (1970). The common meaning of this instruction is that the jury should accept the fact that an accused intended to cause the death without proof of intent, and it forces the accused to assume the burden of proving that he did not intend the death by the presentation of evidence to negate intent. This, of course, is improper as "intent" is an essential element of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The factual conclusion for the jury's determination and for the State to prove beyond a reasonable doubt was that of the Petitioner's intent, and the Court so framed it for the jury. See Appendix (3), pp. 41A-42A. The instruction in question not only forced the Petitioner to place some evidence before the jury on the issue of intent, but it also shifted the burden of proof to the Petitioner on the issue of intent. It is clear that the State cannot, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, shift the burden of proof to the accused on an essential element of the offense charged. It is the State that must prove, beyond a reasonable doubt, every element of the crime charged, and the State cannot rely on presumptions to prove the elements when those presumptions shift the burden of proof to the defendant. *Sandstrom v. Montana, supra; Mullaney v. Wilbur, supra; Patterson v. New York,* 432 U.S. 197 (1977).

In the Petitioner's trial the issue of "intent" was the "crux or heart of the matter", or to use the words of *State v. Moye, supra,* "The issue of intent was therefore paramount in this case." *Id.* 177 Conn. at 490. The jury's determination of the facts of the shooting revolved around the Petitioner's intent, and whether it was murder, manslaughter or accident. Therefore, the instructions on intent were critical to the Petitioner's right to a fair trial, and they did not satisfy the constitutional mandates as set forth in *Sandstrom, supra.*

This Court in *Sandstrom v. Montana, supra,* held that a Trial Court instructing a jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Sandstrom* reaffirms that the State must prove every element of a criminal offense beyond a reasonable doubt. Critical to this matter is *Sandstrom's* holding that if the jury might have interpreted the presumption of a conclusive presumption, or as a burden shifting presumption, then the

conviction cannot stand. *Sandstrom, supra,* at 524. *Sandstrom* also held that these types of instructions conflicted with the accused's presumption of innocence which extends to every element of the crime, and invaded the fact-finding province of the jury, as the jury could interpret the presumption as being one that impermissibly shifts the burden of proof to the accused and necessitates that the accused prove that he lacked the requisite intent, or the jury could view it as a conclusive presumption. *Id.* at 523-525.

In *Moye, supra,* the jury was instructed that "every person was presumed to intend the natural consequences of his own actions." This Court remanded *Moye* to the Connecticut Supreme Court, which declared this instruction to be constitutional error. The instruction in *Moye* and in the Petitioner's case are identical. In fact, the Petitioner and Moye both claimed an accidental shooting, and intent was the critical issue for the jury's determination in both trials.

This Court in *Sandstrom* reasoned that the ordinary juror hearing an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" can view such an instruction as mandatory. This Court in *Sandstrom* wrote that:

> "given the common definition of 'presume' as 'to suppose to be true without proof', Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualified instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury *may* have interpreted the instruction in either of two more stringent ways." [emphasis supplied]
>
> *Sandstrom* at 517.

The two ways refer to the presumption being conclusive or placing a burden on the defendant to prove the contrary by some quantum of proof. Thus, this Court in *Sandstrom* reasoned that:

> "However the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid."
>
> *Sandstrom* at 519

The Trial Court's instructions to the jury on criminal intent, and particularly its presumption instruction given on four distinct occasions as aforesaid, runs afoul of the constitutional restraints as outlined in *Sandstrom, supra; United States v. United States Gypsum Co., supra,* and *Morissette, supra.* The jurors in the Petitioner's matter may have treated the presumption as "conclusive" or to have a "persuasion-shifting effect". This is particularly so in a trial revolving around the question of intent with disputed evidence offered on the issue of intent, as noted by the Trial Court in dwelling at length on the evidence, its disputed nature, and the jury's duty to resolve the issue, with particular reference to intent and its significance as to the jurors' determination of whether or not this was a murder, manslaughter or accident. In other words, the issue of intent was also paramount in this case as it was in *Moye, supra.* Thus, the Trial Court's instruction given on four occasions that "every person is presumed to intend the natural and necessary consequences of his acts" invaded the fact-finding function of the jury. Therefore, in light of the jury instructions on intent in this matter, the Petitioner's conviction and its affirmance by the Connecticut Supreme Court should be reviewed by the granting of Certiorari in order that the challenged jury instructions be passed upon by this Court. This is particularly so as the Connecticut Supreme Court appears to have consistently negated the teachings of *Sandstrom.* In post-*Sandstrom* decisions, the Connecticut Supreme Court has distinguished and/or negated

Sandstrom claims in the following cases: *State v. Arroyo*, 41 Conn. L.J. No. 39, p. 6 (3/26/80); *State v. Perez*, 41 Conn. L.J. No. 52, p. 12 (6/24/80); *State v. Maselli*, 42 Conn. L.J. No. 7, p. 15 (8/12/80); *State v. Vasques*, 42 Conn. L.J. No. 8, p. 36 (8/19/80); *State v. Truppi*, 42 Conn. L.J. No. 25, p. 1 (12/16/80)[1]; *State v. Brokaw*, 42 Conn. L.J. No. 31, p. 9 (1/27/81). These decisions of the Connecticut Supreme Court reject *Sandstrom's* claims and found that other general instructions cured the *Sandstrom* violations. It appears that the Connecticut Supreme Court on only two occasions other than in the *Moye* decision, after remand, has found a *Sandstrom* violation. In *State v. Harrison*, 178 Conn. 689 (1979), the instruction in *Harrison* cast a burden upon the defendant to place credible evidence before the jury to rebut the presumption that a person is presumed to have intended to do the act which he did do. Thus, the instruction in *Harrision* was clearly more offensive than the instruction struck down in *Sandstrom* and *Moye*. In *State v. Theriault*, 42 Conn. L.J. No. 22, p. 8 (11/25/80) the decision involved an instruction under an accessory charge that clearly cast the burden of proof on the accused and was not a typical *Sandstrom* claim.

In *Sandstrom*, *Moye*, and *Stankowski*, there exists a similar factual pattern, in which each defendant admitted shooting the victim, but set forth a defense based upon lack of intent. Sandstrom claimed that chronic alcoholism prevented him from forming the requisite of intent, while Moye and Stankowski claimed that the shooting had been purely accidental and completely unintentional. Therefore, in each instance the State had to prove only the crucial question of intent, which was the sole element of the crime of murder which was in issue before the jury. It appears that the Connecticut Supreme Court, while paying lip service to *Sandstrom*, has reverted to its position in *State v. Moye*

[1]Truppi had a portion of his multiple convictions reversed on a *Harrison* theory discussed *supra*.

as reported in 177 Conn. 487 (1979) which rejected the reasoning in *Sandstrom*. The conflict of the Connecticut Supreme Court and its decisions interpreting *Sandstrom* justifies the granting of Certiorari to review the judgment below.

II. THE CONNECTICUT SUPREME COURT ERRED IN NOT REVERSING THE PETITIONER'S CONVICTION DUE TO THE TRIAL COURT'S EXCLUSION OF RELEVANT, MATERIAL AND EXCULPATORY EVIDENCE OF A DEFENSE WITNESS.

The Trial Court excluded the testimony of Stephen Stankowski detailing how he entered a locked shed, obtained a shotgun shell and loaded the weapon that the Petitioner ultimately fired and which killed the decedent. This testimony was corroborated by the Petitioner's father, Frank Stankowski, who testified to the shed being continuously locked and the circumstances under which Stephen Stankowski re-enacted the events in question.

The Petitioner contends that the Trial Court could have and should have, admitted the testimony of Stephen Stankowski, which was exculpatory in nature, with cautionary instructions at the time of its admission. The Trial Court could have also given appropriate instructions in the jury charge regarding the weight to be accorded in that testimony. Finally, Frank Stankowski should have been permitted to testify to the hearsay re-enactment and questions he posed to Stephen Stankowski in order to corroborate the young man's testimony.

The United States Constitution's Fourteenth Amendment's Due Process of Law Guarantee and its

guarantee of Fundamental Fairness, mandate that criminal defendants have access to information or testimony that is exculpatory and vital to their defense, even in the face of restrictive state evidentiary rules or claims of privilege. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973); *Davis v. Alaska*, 415 U.S. 308 (1974); *United States v. Nixon*, 418 U.S. 683 (1974). See also, *State v. Farrow*, 116 N.H. 731, 366 A.2d 1177 (1976); *Stewart v. Cowan*, 528 F. 2d 79 (6th Cir. 1976); *People v. Silver*, 39 N.Y. 2d 99, 346 N.E. 2d 811, 382 NYS 2d 972 (1976).

The witness' testimony was exculpatory in that it negated intent and supported the Petitioner's testimony that the occurrence was an accident. Thus, it was an error to exclude it due to its exculpatory nature on the critical issue of intent. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf has long been recognized as an essential to due process." *Chambers, supra*, at 295. Therefore, Stephen Stankowski's testimony should have been admitted with proper instructions, and it was constitutional error to exclude it. In fact, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.*, at 302.

Additionally, the Petitioner was denied the right to "compulsory process" as guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution and mandated by *Washington v. Texas*, 388 U.S. 14 (1967)[2] The deprivation of the benefit of Stephen Stankowski's testimony to the Petitioner, when the witness was present and available to give his testimony for the jury's evaluation, violated the defendant's right to offer

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[2]*Washington, supra* at 23, Footnote 21 indicates that the decision does not decide the disqualification of witnesses on the grounds of incompetence or infancy. However, the reasoning of *Washington* and its recognition of the "due process right to call witnesses and to present a defense" would appear to be applicable to this case.

testimony of a witness and to present a defense. See, *United States v. Nixon, supra,* at 709-712, holding that the need for evidence in a criminal trial and the defendant's right to compulsory process must prevail over claims of privilege. Therefore, the witness, Stephen Stankowski, should have been allowed to testify.

The Petitioner requests that this Court grant Certiorari and review the constitutional issues that the Connecticut Supreme Court refused to consider in its decision.

III. THE CONNECTICUT SUPREME COURT ERRED IN APPROVING THE ADMISSION OF UNWARNED STATEMENTS TAKEN IN A CUSTODIAL SITUATION WHEN THERE WAS A SUBSTANTIAL ISSUE AS TO THEIR VOLUNTARINESS AND VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS.

The Petitioner filed a Motion to Suppress a Portion of the Testimony of Trooper David Horan, and the Trial Court held a voir dire hearing on the admissibility of the unwarned statements, and denied the Motion to Suppress. See Appendix (5), pp. 45A-46A. The statements were uttered prior to his having received the standard *Miranda* warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1966), but while in custody of the Connecticut State Police Department.

The Petitioner, shortly after the shooting of the victim on August 25, 1977, was observed by the Connecticut State Police to be in a highly agitated state, wherein he was threatening to take his own life. He was subdued and placed face down on a stretcher with his hands cuffed behind him and was strapped onto said stretcher. The Connecticut State Police first observed him at about 11:35 p.m., and from that time on he was constantly under their observation. At approximately

12:05 a.m. the Petitioner was under the observation of one Trooper Horan, and at or about 1:16 a.m. the Petitioner was warned of his rights under the *Miranda* decision as aforesaid. Furthermore, on or about 2:43 a.m. the Petitioner was tested at the Backus Memorial Hospital to determine the alcohol level of his blood, and later testimony indicated that the Petitioner's alcohol level of his blood at said time was 0.15 and that said level at 12:05 a.m. was 0.20.

In the time period that the Petitioner was cuffed with his hands behind his back and strapped onto the stretcher, he was making unconnected and sometimes incoherent statements relative to the incident in question. In fact, during the same period of time, he was observed to be sobbing and crying hysterically. At some time prior to 1:16 a.m., the straps were loosened on the stretcher and the handcuffs were momentarily removed so as to bring his arms to a forward position, and to allow him to get into a sitting position. During this period of time, Trooper Horan, although making careful note of all of the admissions of the Petitioner, could not remember the approximate time said straps on the stretcher were loosened, and the Petitioner's hands freed from the handcuffs. The statements were read to the jury by Trooper Horan, and were uttered while the Petitioner was strapped face down on the stretcher with his hands behind his back. The statements that Trooper Horan ultimately read to the jury are set forth in Appendix (6), p. 47A.

The Petitioner was entitled to have the Trial Court ensure itself that the evidence being offered as an admission was totally trustworthy. *United States v. Powe*, 519 F.2d 833 (D.C. Cir. 1978). This Court has recognized the same principle in holding that some of the elements it must take into consideration before allowing such evidence are the duration of interrogation, if any is present; the conditions of detention and the overall apparent attitude of the police toward the defendant; the defendant's physical and psychological state;

and all other conditions which might serve to drain one's powers to resist a suggestion or to walk a path of rational self-determination. *Culombe v. Connecticut*, 367 U.S. 568 (1961).

The Petitioner at the time of the incident was a nineteen year old boy, who upon first observation appeared to be highly distraught and self-destructive. He was taken into custody by the police at or about 11:35 p.m. on August 25, 1977, and was constantly in their custody until approximately 1:16 a.m. the next morning, when he was first informed of his *Miranda* rights. Prior to said warning he was subdued by the police, handcuffed with his hands behind his back, placed on a stretcher face down, and strapped onto said stretcher. At or about 12:05 to 12:15 a.m., the Petitioner was transported from the scene of the alleged crime to the Colchester Barracks, where he remained in the same position on the stretcher until some short period prior to 1:16 a.m. During said period of time he was observed sobbing, sleeping and making statements both of an exculpatory and inculpatory nature. At a later point in time, blood tests were taken to determine the alcohol level of his blood, and it was found at that time that said level was beyond the level permissible under the laws of the State of Connecticut to create a presumption of intoxication, or at least one's being under the influence for purposes of operating a motor vehicle.

In the Pennsylvania case of *Commonwealth v. Smith*, 470 Pa. 220, 368 A.2d 272 (1977), the Petitioner was taken into custody shortly after he had released himself from the hospital from an attempted suicide, and was charged with the murder of an individual some three months prior to the date of his arrest. He was taken to the police station and handcuffed to a chair for approximately two hours. He was then advised of his rights and told the police he had nothing to say. Approximately five hours later, the police told him that his brother-in-law had implicated him in the killing. At that time he had made up his mind and gave the police a statement. The Court, in overturning the conviction, stated:

> The ultimate test for voluntariness is whether the confession is the product of an essentially free and unconstrained choice by the maker. If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne or his capacity for self-determination critically impaired, the use of his confession offends due process, citing, *Rogers v. Richmond*, 365 U.S. 534, 5 L. Ed. 2d 760, 81 S. Ct. 735 (1961). The line of distinction is that at which governing self direction is lost and compulsion, of whatever nature or however infused, propels or helps propel the confessions. *Culombe v. Connecticut, supra*, 367 U.S. at 602 (citations omitted). An evaluation seeking to determine whether a confession is involuntary due to psychological coercion must consider those elements impinging upon the defendant's will, such as the duration and methods of interrogation, the conditions of detention and the manifest attitude of the police toward the defendant's physical and psychological state and all of the conditions present which may serve to drain one's powers of resistance to suggestion and undermine his self-determination. See *Culombe v. Connecticut, supra*, 367 U.S. 602 (citations omitted).
>
> *Smith* at 275

There is no dispute that the statements made by the Petitioner were made while in custody and prior to his having received any warning but made ostensibly without any questioning by the police. *State v. Stankowski*, 42 Conn. L.J. No. 46, p. 5 at 8-11, Appendix (1), pp. 12A-13A. The Court in *United States v. Powe, supra*, held, "of primary concern is the interest in insuring the trustworthiness of evidence." *Powe* at 839-40. As this Court recognized, coerced statements are inherently suspect, and the methods of coercion are not limited to acts of physical brutality. *Blackburn v. Alabama*, 361 U.S. 199 at 206 (1960). One of the considerations consistently cited by this Court is the interest of preserving

the individual's freedom of will. *Blackburn v. Alabama, supra*, at 206-207. Although various formulations have been given to this concept, it embraces the principle that the makeup of a free man includes his mechanisms for self-preservation, refraining from speech that may endanger him... "but his statement does not reflect his own free will or intellect if his statement is attributable in critical measure to the fact that his self protective mechanisms are negated or overridden by external force or fraud, conditions of insanity, or the compulsion of drugs." *Pea v. United States*, 397 F.2d 627, 634 (D. C. Cir. 1967).

It is acknowledged that certain admissions of an accused are admissible when voluntarily offered by the accused in a custodial situation, but prior to his having been warned of his *Miranda* rights. *Miranda v. Arizona, supra.* These so-called threshold confessions are generally made in the police cruiser on the way to the station, during the routine booking situation, and when one walks into a police station or up to a policeman and volunteers that he is guilty of some crime. Those circumstances lend themselves to a conclusion of credibility, and for that reason they are allowed in as evidence, although the police have failed to warn the confessing individual of his rights. *Cf. Miranda* at 478.

The Petitioner's situation was entirely different in that the accused was in the custody of the police, isolated from any sympathetic company, and restrained in such a fashion that he was totally at the mercy of his captors. Compounding these circumstances were the presence of alcohol and drugs, and the trauma of the terrible incident that had taken place some two hours previously. It goes without saying that if the police had questioned the accused under these circumstances, without warning him of his rights, any answers derived from said questioning would have been excluded. Trooper Horan testified on several occasions that he had asked no questions, nor had anyone in his presence asked any questions, of the accused. The requirement on the police of warning the accused with respect to his

Fifth Amendment privilege is a fundamental right and not simply a preliminary ritual to existing methods of interrogation. *Miranda* at 476.

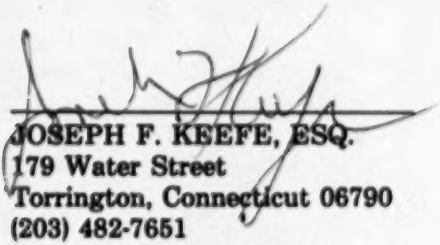
In the instant case, the police found certain basic conditions to be present - i.e., his intoxication, the trauma of the immediate incident, and the fact that he was in police custody. They compounded these circumstances by cuffing him with his hands behind his back and placing him on a stretcher, strapped in such a position that he was unable to move or observe his captors. They then transported him to the Colchester Barracks, where they held him for a period of time in this strapped down condition, although he was immediately adjacent to a cell. The Trial Court found that during that period of time, under these circumstances the Petitioner's statements were voluntary admissions.

The conditions within which the Petitioner found himself created an absolute obligation on the part of the police (who were also there to protect him) to warn him of his rights before they could become collateral beneficiaries of said admissions. For this Court to hold otherwise would be to open the door for any number of situations whereby the police, without asking a single question, could place an accused into such a position that through sheer terror he would make any number of admissions simply to free himself of the situation he found himself in. In fact, the nature of the statements made by the accused during this period of time substantiate this point. Certainly the statements read into evidence by Trooper Horan cannot be held to be the product of a rational mind. See Appendix (6), p. 47A. Therefore, it is respectfully submitted that the Connecticut Supreme Court erred in finding the admission of these statements in conformity with *Miranda v. Arizona, supra,* and *Culombe v. Connecticut, supra.* Thus, this Court should grant Certiorari to review the judgment of the Connecticut Supreme Court as regards the admission of these statements.

CONCLUSION

For the reasons hereinbefore set forth, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,



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NO._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

GARY STANKOWSKI
Petitioner

v.

STATE OF CONNECTICUT
Respondent

APPENDIX

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APPENDIX (1)

Opinion of Connecticut State Supreme Court
XLII Conn. L.J. No. 46 at 5
(May 12, 1980)

SUPREME COURT

December Term, 1980

STATE OF CONNECTICUT *v.* GARY STANKOWSKI

BOGDANSKI, PETERS, HEALEY, ARMENTANO and WRIGHT, Js.

Argued December 3, 1980—decision released May 12, 1981

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Naruk, J.;* verdict and judgment of guilty and appeal by the defendant to this court. *No error.*

Joseph F. Keefe and *Edward J. Peters, Jr.,* for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, was *John T. Redway,* state's attorney, for the appellee (state).

ARTHUR H. HEALEY, J. After trial to a jury of twelve, the defendant was found guilty of murder in violation of General Statutes § 53a-54a (a). Upon the trial court's denial of his motions for acquittal and for a new trial, the defendant has appealed and presses seven claims of error. He contends that the trial court erred: (1) in denying his motions for judgment of acquittal; (2) in admitting statements made by him while he was in police custody; (3) in excluding the testimony of a child witness; (4) in

giving the "Chip Smith" charge; (5) in its charge to the petit jury on the element of intent; (6) in its charge to the grand jury on the element of intent; and (7) in denying his post-trial motion for a new trial based on juror misconduct.

From the evidence presented at trial, the jury could have reasonably found the following: At approximately 8 p.m., on August 25, 1977, after having consumed two beers at the Hilltop Lounge, the defendant met Stephen Grant at Moodus Center. The defendant asked Grant if he wanted to smoke a marijuana cigarette, and Grant said yes. The defendant then purchased a six pack of sixteen-ounce bottles of beer and met Grant and George Hungerford at Hungerford's car. The three then proceeded to Grant's van, in which they passed around a marijuana cigaratte supplied by the defendant.

Soon Cathy Jansky, Valerie Vickers, Harold Corey and Susan Fournier arrived. In addition to the beer drunk and the marijuana smoked by the defendant and others in the van, the defendant also consumed some whiskey and later drank some gin and ginger ale.

At approximately 10:30 p.m., the defendant, Hungerford, Jansky, Vickers and Corey left the van for Hungerford's car, and then went to the defendant's house at the defendant's invitation "[t]o finish the gin and have some more marijuana . . . ." Hungerford later testified that, initially, while he, the defendant, and Corey were in Hungerford's car, with the windows rolled up, the defendant said that Vickers and Jansky should not be let into the car. After Hungerford indicated that they were "nice girls," the defendant stated that "Cathy was all right, but he really did not like Valerie."

Once at the house, they all proceeded to the loft over the Stankowski garage, where the defendant put on the radio and then played a tape, and he smoked another marijuana cigarette. After Hunger-

ford indicated to the defendant that he was in need of bathroom facilities, the two left and relieved themselves outside of a shed behind the garage. The defendant then brought Hungerford into the garage to see a boat that his family had for sale. While in the garage, the defendant told Hungerford that he had some antique guns. The guns were locked up in a shed, but the defendant indicated to Hungerford that the door could be pulled open. The two proceeded to the shed where they pulled open the shed door. The defendant then pulled out a .12 gauge shotgun, which he handed to Hungerford, and then reached for a .22 gauge rifle. He exchanged the rifle with Hungerford for the shotgun. The defendant reached back into the shed. Hungerford testified that he heard the defendant rustling through some shells, and told him not to "mess around with any shells." The defendant told him he "wouldn't mess around with shells." The two then left to return to the loft. Hungerford did not actually see the defendant take out any shells.

When they reached the loft, Hungerford proceeded ahead of the defendant up the stairway. Behind him, Hungerford heard the defendant making a lot of noise with the gun. "It was a lot of metal like noise, like it [the gun] was being cocked and opened up and stuff." Hungerford told the defendant that he sounded as if he were ready to go "hunting or something," to which the defendant "laughed and then he didn't say too much."

When they reached the loft, the defendant took the .12 gauge shotgun to where Vickers was seated, and pulled up a folding chair. Just before Vickers was shot, Corey told the defendant that the defendant was getting "kind of reckless" with the shotgun, and asked the defendant to "put it up." After the defendant ignored Corey's request, Corey returned to looking at the .22 gauge rifle held by Hungerford. He later overheard a conversation between the defendant and the victim wherein he heard the

defendant say "something" and then heard Vickers say "go ahead," followed "seconds" later by a shotgun blast which killed Vickers. Jansky also testified that she saw the defendant point the gun at Vickers while he was seated next to Vickers, and heard him tell Vickers that he was going to shoot her. After Vickers responded "go ahead," Jansky heard a shot go off.

I

At the close of the state's case, at the close of all the evidence, and after the jury returned their verdict of guilty, the defendant moved for judgment of acquittal, contending that the state failed to meet the burden of proving beyond a reasonable doubt every element of the crime charged, specifically that of intent. The defendant claims that the court erred in denying these motions.

General Statutes § 53a-54a (a) provides that "[a] person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person." Section 53a-3 (11) states: "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." At trial, the defendant offered evidence to show that the shooting was accidental. He testified that once he brought the shotgun upstairs, he handed it to the deceased. The victim allegedly handled the gun for a while, discussing it with him. According to the defendant's testimony, at one point the defendant asked Vickers if she wanted to roll a "joint," to which she responded "go ahead." The defendant claimed that he then placed the gun on a table; that Vickers grabbed the end of the barrel and tapped it on the edge of the table a few times; and that she then placed two hands on the rifle and pulled it, whereupon the gun went off.

The state offered evidence to rebut the claim that the shooting was accidental. In addition to the previously described testimony of the others present on the loft, the state introduced evidence of state trooper Ronald Luneau, a fingerprint examiner, who analyzed the .12 gauge shotgun which killed Vickers. Luneau found no prints or smudges of any kind on the barrel of the shotgun. Jansky also testified that after the shooting, she checked the victim. The victim was holding a "joint" in her right hand. Both of these pieces of evidence tended to rebut the testimony of the defendant.

We have repeatedly stated the test which this court employs to determine whether the evidence is sufficient to sustain a verdict: " '[T]he issue is whether the jury could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt . . . .' " *State* v. *Gaynor*, Conn. (42 Conn. L.J., No. 25, p. 25) (1980), quoting *State* v. *Festo*, Conn. (41 Conn. L.J., No. 52, pp. 7, 9) (1980); *State* v. *Nemeth*, Conn. (42 Conn. L.J., No. 23, pp. 3, 5) (1980); *State* v. *Saracino*, 178 Conn. 416, 419, 423 A.2d 102 (1979); *State* v. *Jackson*, 176 Conn. 257, 262, 407 A.2d 948 (1978). "In ruling on such a motion, the evidence presented at the trial must be given a construction most favorable to sustaining the jury's verdict." *State* v. *Jackson*, supra, 262; see *State* v. *Nemeth*, supra; *State* v. *Chetcuti*, 173 Conn. 165, 172, 377 A.2d 263 (1977). Each essential element of the crime charged must be established by proof beyond a reasonable doubt, " 'and although it is within the province of the jury to draw reasonable, logical inferences from the facts proven, they may not resort to speculation and conjecture.' " *State* v. *Gaynor*, supra, 25; *State* v. *Festo*, supra, 9.

It is obvious from the verdict that the jury chose to believe the state's witnesses and to disbelieve the

defendant's version of how the shooting occurred. In a jury trial, the credibility of witnesses and the weight to be given testimony is for the jury to determine. See *State* v. *Gaynor*, supra, 26; *State* v. *Ortiz*, 169 Conn. 642, 646, 363 A.2d 1091 (1975). This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict.

We have stated: "Intent is a mental process which ordinarily can be proven only by circumstantial evidence." *State* v. *Zdanis*, Conn. (42 Conn. L.J., No. 23, pp. 10, 12) (1980), cert. denied, U.S. (49 U.S.L.W. 3710 [March 23, 1981]). "The intent of the actor is a question for the trier of fact, and the conclusion drawn by the trier in this regard should stand unless it is an unreasonable one." *State* v. *Holley*, 174 Conn. 22, 26, 381 A.2d 539 (1977).

Although there was not overwhelming evidence to support the finding of the requisite intent, and thus the defendant's guilt, there was sufficient evidence to support the jury's verdict. As concluded by the trial court: "From the evidence presented, the jury could have found that the defendant did not 'like' the decedent; that the defendant, despite contrary admonitions, obtained shells and deliberately loaded the shotgun before returning to the loft; that, upon returning to the loft, he pointed the loaded shotgun at the decedent and told her that he was going to shoot her; and that, when she said 'Go ahead,' he pulled the trigger. Further, the lack of any fingerprint smudges on the rifle and powder burns on the victim's hands and person, belied the defendant's claim that the victim caused her own death by pulling on the barrel of the shotgun."[1]

II

The defendant argues that the trial court erred in admitting statements made by him after he was taken into custody and before he was informed of

his rights under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

On the evening in question, at about 11:45 p.m., the Colchester state police received a phone call that an accident had occurred at the Stankowski residence on Falls Road in Moodus. Upon their arrival at the residence at approximately midnight, the defendant was observed by the police to be holding a razor blade in his hand, threatening to kill himself. He screamed obscenities at the police, threatening to kill them. After a struggle, three officers managed to subdue the defendant, who exhibited a great deal of strength; they handcuffed his hands behind his back. The defendant continued to struggle, and the police attempted to restrain him by holding him against the ground.

Since the original dispatch to the police had indicated that there was a shooting, an ambulance was sent to the scene. After the ambulance's arrival at approximately 12:10 a.m., because of the struggle and the inability of the police to control the defendant, the defendant was strapped face down on a stretcher obtained from the ambulance. The defendant, at approximately 12:15 a.m., was transported by ambulance to the Colchester police barracks. The direct ride to the barracks took around twenty minutes.

Although it is unclear when the defendant's restraints were loosened, trooper David Horan,[3] who had accompanied the defendant in the ambulance and was present at the barracks, at one point testified that within five to ten minutes after arrival at the barracks, the straps about the defendant's legs were loosened, his handcuffs were changed from behind his back to in front, and he was allowed to sit up.

At approximately 1:15 a.m., he was warned of his *Miranda* rights. From the time the police took the defendant into custody to the time he was given his *Miranda* rights, trooper Horan testified that neither

he, nor anyone in his presence, asked the defendant any questions.

The defendant attempted to suppress various inculpatory and exculpatory statements made by him, and recorded by trooper Horan, after he had been taken into custody and before he was given his *Miranda* rights. After a hearing, the court admitted the statements. On appeal, the defendant claims that the court erred in refusing to suppress the statements made during that time. His argument appears to be two-pronged: (1) the statements are inadmissible because they were not voluntarily given; and (2) they are not admissible because they were uttered prior to the time he was advised of his *Miranda* rights.

A

We first examine whether the defendant's statements are inadmissible because they were involuntarily given. The ultimate test of the admissibility of such statements is their voluntariness. See *Culombe* v. *Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); *Rogers* v. *Richmond*, 365 U.S. 534, 544, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961); *State* v. *Staples*, 175 Conn. 398, 406, 399 A.2d 1269 (1978). The state is required to prove, by a preponderance of the evidence, that under all the circumstances a particular confession is voluntary. *Lego* v. *Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); *State* v. *Hawthorne*, 176 Conn. 367, 370, 407 A.2d 1001 (1978); *State* v. *Staples*, supra, 406–407; *State* v. *Vollhardt*, 157 Conn. 25, 34, 244 A.2d 601 (1968). "The issue of whether a confession is voluntary and admissible is, in the first instance, one of fact for determination by the trial court in the exercise of its legal discretion. *State* v. *Devine*, 149 Conn. 640, 652, 183 A.2d 612 (1962). That discretion must, however, be exercised in accordance with constitutional standards of due process. *State* v. *Staples*, [supra, 408]." *State* v. *Derrico*, Conn. (41 Conn. L.J., No. 50, pp. 7,

11) (1980), cert. denied, U.S. (49 U.S.L.W. 3443 [Dec[illegible]ber 15, 1980]).

We have stated that "'"the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . .' *Rogers* v. *Richmond*, 365 U.S. 534, 544, [81 S. Ct. 735, 5 L. Ed. 2d 760] (1961)."'" *State* v. *Staples*, supra, 408; see *State* v. *Derrico*, supra, 11. "The ultimate test remains . . . . 'Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'" *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), quoting *Culombe* v. *Connecticut*, supra, 602; see *State* v. *Derrico*, supra, 11.

The trial court concluded: "There was no evidence of any mistreatment, threats or promises or physical or mental abuse which would deprive an otherwise rational mind of the exercise of free will and power of decision and discernment. The record in this case is totally devoid of any indication that the defendant was subjected to this sort of coercion or intimidation either while he was riding back to the barracks or while he was being held at the barracks."[3] On the basis of a review of the evidence before it, we cannot conclude that the trial court erred in holding that the defendant's statements were not involuntary.

An examination of the record before us discloses that there is no indication, from the time the defendant was taken into custody to the time when he was given his *Miranda* rights, that the defendant was coerced into giving the statements which he now

claims are inadmissible. The record does not indicate any attempt by the police to elicit any statements from the defendant. The defendant makes no claim that the police verbally interrogated him, or that the police used any threats, promises or offers of leniency to obtain a confession. The restraint employed by the police in handcuffing the defendant and transporting him by stretcher was reasonably necessary in view of the defendant's attempts to prevent the police from restraining him, and in light of his threats of taking his own life and those of the police officers. Upon his arrival at the barracks, his leg restraints were soon thereafter loosened and he was allowed to sit up with his hands cuffed in front of him.

The time period involved in the episode in question is also significant in determining the possible existence of any psychological pressures on the defendant to give a statement. The whole period in question lasted, at most, a little over an hour: the police first confronted the defendant around midnight; he was handcuffed, placed on a stretcher, and then transported by ambulance directly to the police barracks at approximately 12:15 a.m.; he arrived at the barracks around 12:35 a.m.; and he was advised of his *Miranda* rights at approximately 1:15 a.m.

Although the defendant was in his teens, he was not in his early teens; at the age of nineteen he had already passed the age of majority in our state. General Statutes § 1-1d. There is no claim that he was intellectually or psychologically deficient in any way.

The defendant argues that due to his ingestion of alcohol and use of marijuana, both of which were self-induced, his statements cannot be deemed to be voluntary. "[T]he use of drugs or the ingestion of alcoholic beverages does not in and of itself render a subsequent admission inadmissible." *People* v.

Pawlicke, 62 Ill. App. 3d 791, 796, 379 N.E.2d 798 (1978); see *United States* v. *Brown*, 535 F.2d 424, 427 (8th Cir. 1976); *State* v. *Peterson*, 366 A.2d 525 (Me. 1976). It is one factor to be considered in determining the voluntariness of a statement. See *State* v. *Peterson*, supra; *Commonwealth* v. *Jones*, 457 Pa. 423, 322 A.2d 119, 125 (1974).

Despite the fact that the defendant had ingested alcoholic beverages and had used marijuana before the killing, both troopers Martin Hart and David Horan testified that the defendant's statements during the time in question were not slurred and were comprehensible. Trooper Hart testified that before the defendant was placed in the ambulance, the defendant's speech was not slurred, he did not hiccup, belch or vomit, nor did he appear to sway or stagger while walking. He was alert to the presence of the officers.

Trooper Horan, who accompanied the defendant in the ambulance and was with him at the barracks, testified that during the time he was with the defendant, the defendant's speech was not mumbled or slurred; he did not hiccup or belch, or give any indication of the need to vomit. About fifteen minutes after the defendant was advised of his rights, the defendant was allowed to walk to a vending machine, about twenty feet away, to purchase a package of cigarettes; soon thereafter, he used the bathroom facilities. During both times, he did not appear either to stumble or to sway.

We conclude that, upon a review of the record, there is sufficient evidence to support the trial court's conclusion that the defendant's will was not overborne and that his statements were not involuntarily made. See *State* v. *Derrico*, supra, 11–12; cf. *Rogers* v. *Richmond*, supra; *Culombe* v. *Connecticut*, supra.

B

We next examine whether the defendant's statements are inadmissible because they were uttered prior to the time he was given his *Miranda* warnings. *Miranda* held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the [fifth amendment's] privilege against self-incrimination." *Miranda* v. *Arizona*, supra, 444. Before one suspected of the commission of a crime is entitled to the warnings constitutionally required by *Miranda*, however, two conditions must be satisfied: the suspect must be in the custody of law enforcement officials; *Oregon* v. *Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *Beckwith* v. *United States*, 425 U.S. 341, 344–48, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976); and the suspect must be subjected to interrogation. *Rhode Island* v. *Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); *Miranda* v. *Arizona*, supra, 444. The defendant was clearly in custody during the time period in question. The question becomes whether he was the subject of police interrogation.

In *Rhode Island* v. *Innis*, supra, the United States Supreme Court defined what conduct amounted to "interrogation" for *Miranda* purposes. The court stated: "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police

surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, supra, 301–302.

Under the facts of this case, we cannot conclude that the defendant was interrogated so as to invoke the *Miranda* warnings. The defendant makes no claim that the police or anyone else verbally questioned him during the time at issue. Trooper Horan, in fact, testified on several occasions that neither he nor anyone else in his presence asked the accused any questions.

The issue is then whether the defendant can be deemed to have been subjected to the "functional equivalent" of interrogation. Upon a review of all of the circumstances in this case, we hold that he was not.

Although the test in *Innis* is an objective one, the Supreme Court noted that the intent of the police is not irrelevant. This is so "for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Rhode Island* v. *Innis*, supra, 301–302 n.7. There is clearly no indication from the record that the police conduct in this case was designed to elicit incriminating utterances from the defendant. Although trooper Horan took notes of the defendant's statements, this factor cannot alone be decisive of an intent to interrogate, "for a law officer would be derelict in his duty not to log an accused's incriminating statements . . . ." *United States* v. *Voice*, 627 F.2d 138, 145 (8th Cir. 1980).

We simply cannot conclude that the defendant was subjected to any words of or actions by the police that the police should have known were reasonably likely to elicit incriminating responses from the defendant. Cf. *State* v. *Krajger*, Conn. (42 Conn. L.J., No. 25, p. 22) (1980).

III

The defendant claims that the court erred in excluding the testimony of a six-year-old child, Stephen Stankowski, who is a nephew of the defendant. During the trial, the defendant made an offer of proof regarding testimony of Stephen to the effect that Stephen had previously loaded the shotgun which later was involved in the fatal shooting. Out of the presence of the jury, the defendant's attorney, the state's attorney and the trial judge all asked Stephen a number of questions. In addition, the defendant's witness, Dr. Mark Kaplan, a clinical psychologist, testified as to Stephen's intelligence and psychological make-up. Kaplan also provided the court with a seven-page report of his examination of Stephen.

After Kaplan testified, the trial judge ruled that he was of the opinion that the child was not competent to testify. He stated: ". . . even in the most liberal stretch of the rule that I can make, the witness is not qualified."[4]

This court recently has had occasion to discuss the standards by which the competency of a child witness to testify is to be determined. "The testimonial capacity of a child witness is a matter for the court to determine upon inquiry. *State* v. *Segerberg*, 131 Conn. 546, 547, 41 A.2d 101 (1945). In Connecticut, the examination to determine the competency of a witness is usually conducted by counsel under direction of the court, except insofar as the court may find it advisable to intervene. See *State* v. *Orlando*, 115 Conn. 672, 676, 163 A. 256 (1932). Because the competency of a witness is a matter

peculiarly within the discretion of the trial court, its ruling will be disturbed only in a clear case of abuse or of some error in law. *State* v. *Siberon*, 166 Conn. 455, 457, 352 A.2d 285 (1974); *State* v. *Orlando*, supra, 675; *Kuczon* v. *Tomkievicz*, 100 Conn. 560, 572–73, 124 A. 226 (1924).

"In determining the competency of child witnesses, age is not the decisive factor. See *Kuczon* v. *Tomkievicz*, supra, 570; McCormick, Evidence (2d Ed.) § 62. Instead, the trial court must consider 'the proposed witness' maturity to receive correct impressions by his senses, ability to recollect and narrate intelligently, and ability to appreciate the moral duty to tell the truth.' *State* v. *Siberon*, supra, 458. The witness should also have an intelligent comprehension of the facts sought to be developed. See *State* v. *Segerberg*, supra, 548; *Kuczon* v. *Tomkievicz*, supra, 570; *McCormick*, loc. cit." *State* v. *Rodriguez*, Conn. (41 Conn. L.J., No. 44, pp. 12, 14–15) (1980). See also 2 Wharton, Criminal Evidence (13th Ed.) §§ 379–380.

Upon review of the evidence, we cannot conclude that the trial judge abused his discretion by not allowing Stephen Stankowski to testify. The trial judge, who has the advantage of viewing the child first hand, and observing the child's demeanor and ability to answer questions posed to him, could have reasonably come to the conclusion that Stephen did not have the ability to recollect and narrate intelligently, or the ability to appreciate the moral duty to tell the truth.[8]

IV

The defendant contends that the court erred in giving a supplemental instruction to the jury. After the jury had been deliberating for approximately two and one-half days, they came back and asked the trial court whether they had "to reach a unanimous decision on the first or more serious charge

before considering the lesser charge?" After the trial court answered yes and explained its answer, it then gave the jury a charge on the role and responsibility of the jurors, commonly referred to as a "Chip Smith" instruction.[4] See *State* v. *Smith*, 49 Conn. 376 (1881). The defendant objected to the giving of the charge, contending that the charge violated his due process of law and right to a jury trial under article first, § 8 of the Connecticut constitution because it coerces the "jurors individually into listening to and adopting the conclusions of their fellow jurors."

We disagree. We have had recent occasion to note: "The possibility of disagreement by the jury is implicit in the requirement of a unanimous verdict and is part of the constitutional safeguard of trial by jury. See *United States* v. *Harris*, 391 F.2d 348, 355 (6th Cir. [1968]); *Thaggard* v. *United States*, 354 F.2d 735, 740 (5th Cir. [1965]) (Coleman, J., concurring specially); *Jenkins* v. *United States*, 330 F.2d 220, 222 (D.C. Cir. [1964]) (Wright, J., dissenting), rev'd, 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957 [1965]; *Green* v. *United States*, 309 F.2d 852, 856 (5th Cir. [1962]). . . . While a defendant is not entitled to an instruction that a jury may 'hang'; *United States* v. *Sawyers*, 423 F.2d 1335, 1340 (4th Cir. [1970]); *United States* v. *Bowles*, 428 F.2d 592, 596 (2d Cir.), cert. denied, 400 U.S. 928, 91 S. Ct. 193, 27 L. Ed. 2d 188 [1970]; he is entitled to a jury unfettered by an order to decide. *Jenkins* v. *United States*, 380 U.S. 445, 446, 85 S. Ct. 1059, 13 L. Ed. 2d 957 [1965]." *State* v. *Peary*, 176 Conn. 170, 183–84, 405 A.2d 626 (1978), quoting *State* v. *Ralls*, 167 Conn. 408, 421–22, 356 A.2d 147 (1974).

In the present case, the court's charge cannot be said to have coerced the jurors. When read as a whole, the charge adequately apprised the jurors of their individual responsibility both to reconsider

their opinion and "to reach his or her own conclusion," and not merely to acquiesce in the conclusions of others. See *United States* v. *Robinson*, 560 F.2d 507, 517 (2d Cir. 1977), cert. denied, 435 U.S. 905, 98 S. Ct. 1451, 55 L. Ed. 2d 496 (1978). We cannot conclude that the court's charge, when read as a whole, was prejudicial to the defendant. See *State* v. *Peary*, supra; *State* v. *Martinez*, 173 Conn. 541, 378 A.2d 517 (1977); *State* v. *Ralls*, supra; *State* v. *Keeler*, 164 Conn. 42, 316 A.2d 782 (1972); *Tough* v. *Ives*, 162 Conn. 274, 294 A.2d 67 (1972); *State* v. *Walters*, 145 Conn. 60, 138 A.2d 786, cert. denied, 358 U.S. 46, 79 S. Ct. 70, 3 L. Ed. 2d 45 (1958); *State* v. *Schleifer*, 102 Conn. 708, 130 A. 184 (1925); *State* v. *Smith*, supra.[7]

V

The defendant also claims that the trial court erred in its instruction to the trial jury on the issue of intent as an element of the crime of murder. He specifically contends that the court's charge impermissibly shifted the burden of proof to him, thereby violating his constitutional protections of the presumption of innocence and of due process of law as guaranteed by the fourteenth amendment to the United States constitution. See *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). He takes issue with that portion of the charge which stated: "A person's intentions may be inferred from his conduct. Every person under the law is presumed to intend the natural and necessary consequences of his acts."[8]

On a number of recent occasions, this court has reviewed claims based on an alleged violation of *Sandstrom* v. *Montana*, supra.[9] See, e.g., *State* v. *Brokaw*, Conn. (42 Conn. L.J., No. 31, pp. 9, 11) (1981); *State* v. *Truppi*, Conn. (42 Conn. L.J., No. 25, pp. 1, 2–6) (1980); *State* v. *Theriault*, Conn. (42 Conn. L.J., No. 22, pp. 8, 11–13) (1980); *State* v. *Vasquez*, Conn. (42 Conn. L.J., No. 8, pp. 36, 37–40) (1980); *State* v. *Maselli*, Conn.

(42 Conn. L.J., No. 7, pp. 15, 18–19) (1980); *State* v. *Perez*, Conn. (41 Conn. L.J., No. 52, pp. 12, 16–17) (1980); *State* v. *Arroyo*, Conn. (41 Conn. L.J., No. 39, p. 6) (1980). We have cautioned that the *Sandstrom* holding must not be oversimplified; see *State* v. *Vasquez*, supra, 38; *State* v. *Arroyo*, supra, 7; and that other instructions may be adequate to overcome the potential for confusing the jury on the issue of inferences and presumptions with regard to intent. See *State* v. *Vasquez*, supra; *State* v. *Arroyo*, supra; *State* v. *Harrison*, 178 Conn. 689, 697, 425 A.2d 111 (1979).

We have carefully examined the entire charge and have concluded that the instructions on the element of intent did not violate the defendant's constitutional rights as claimed. Prior to giving the charge on intent that is attacked, the court instructed at length on the matter of circumstantial evidence and inferences; the terms "infer" and "inference" were specifically and repeatedly explained in permissive terms. The jury were informed that "you *may* draw inferences from the facts that *you find to be established* in the case" and that any "[i]nferences that you *may* draw from these established facts must be logical and reasonable and well founded upon the facts which have been proven during the course of the trial." (Emphasis added.) The sentence before the portion objected to was "[a] person's intentions *may* be inferred from his conduct." This sentence, together with the portions attacked, appeared in the court's charge not only after but also before language instructing on the permissive nature of the jury's function in drawing inferences.

The court also pointed out that the element of intent "is obviously a crucial element in this case" which the state must prove beyond a reasonable doubt. The court made clear, both as to murder and manslaughter, that it was for them to decide

whether the state had proven beyond a reasonable doubt the element of intent. The court charged at length on the matter of intoxication and its bearing on the jury's determination of the element of intent. Evidence that the state claimed tended to demonstrate the existence of the requisite intent, as well as evidence the defense claimed tended to negate such intent, was commented upon. In its summary at the end of the charge, the court told the jury that it was for them to decide whether the defendant had the intent to cause the death of the victim, or that he had the intent only to cause her serious physical injury or, as the defense claimed, that "he had no intention of any kind to cause any harm, neither death nor serious physical injury." The court's instructions placed the burden of proof squarely on the state as to every essential element of the crime. They pointed out that the defendant "does not have to prove his innocence" and adequately instructed the jury on the defendant's presumption of innocence.

We are aware that general instructions on the burden of proof or the presumption of innocence do not in and of themselves dispel the possibility that the jury could have interpreted the instruction on intent in an unconstitutional manner. See *Sandstrom* v. *Montana,* supra, 518 n.7. Such instructions, however, may be considered with all other instructions relevant to the claim raised to determine whether the jury could have interpreted the presumption involved to be either conclusive or burden-shifting and, thus, unconstitutional. See *State* v. *Vasquez,* supra, 38.

The instructions in this case which the defendant attacks are very similar to the murder instructions which we upheld in *State* v. *Arroyo.*[10] Upon review, we conclude that the attacked portions of this charge, when considered in light of the charge as a whole, including the explanatory instructions on inference and circumstantial evidence, could not be

reasonably construed to require a conclusive presumption or a shifting of the burden of proof, and did not deprive the defendant of his due process right to a fair trial. See *State* v. *Arroyo*, supra.

VI

The defendant also claims that the court erred in its instruction to the grand jury on the issue of intent as an element of the crime of murder. He contends that the court's charge to the grand jury impermissibly shifted the burden of proof to him, thereby violating his constitutional protection of the presumption of innocence and of due process of law.

In *State* v. *Stepney*, Conn. (41 Conn. L.J., No. 52, p. 1) (1980), cert. denied, U.S. (49 U.S.L.W. 3493 [January 12, 1981]), we considered the question whether the prohibitions enunciated in *Sandstrom* regarding instructions delivered to a petit jury on the issue of criminal intent were applicable in grand jury proceedings. For the reasons stated therein, we concluded that "the interests intended to be protected by the prohibitions delineated in *Sandstrom* with regard to a petit jury are not equally imperiled within the context of a grand jury proceeding as conducted in this state . . . ." *State* v. *Stepney*, supra, 2. Accordingly, we find no error with regard to this claim.

VII

Finally, the defendant contends that the court erred in denying his post trial motion for a new trial as a result of juror misconduct occurring during the course of the trial. As found by the court, on May 3, 1978, at a luncheon recess, a conversation took place in the main lobby of the courthouse between the defendant and one of the jurors sitting on the case. The juror began the conversation with the defendant by asking him if the other jurors had come back yet. After the defendant replied "No,"

the juror commented about the weather and then said: "It looks like it's going to be a long trial." The defendant responded by saying "You have to go through a lot to prove what happened or to prove an accident." The juror then asked the defendant about his belief in God, to which the defendant stated that he felt that God had let him down. Finally, in response to a question posed by the juror about the victim in the case, the defendant volunteered the information that he had written a letter to the victim's mother in which he stated the victim's death was an accident and that he was sorry. The conversation then terminated when the defendant observed a sheriff approaching down a corridor heading to the main lobby.

This conversation was observed by the defendant's father and a secretary employed by the defendant's trial counsel. The secretary did not overhear any of the conversation; the defendant's father only overheard a part of the conversation.

Later that day, the defendant told Thomas Flood, a licensed private investigator who was employed by and who assisted the defendant's trial counsel during the trial, about the incident. Flood told the defendant to tell his trial counsel about the conversation with the juror. The defendant had also previously been instructed by his trial counsel not to talk to anybody during the trial.

The defendant knew he was not following his trial counsel's instructions when he talked to the juror. Yet, he did not tell his trial counsel of his conversation because he knew the conversation was improper[11] and was therefore afraid of his trial counsel's response.

After the unfavorable verdict was reached, the defendant informed his trial counsel of the conversation. His counsel then moved for a new trial, and a hearing was held on the issue. The court refused to grant the defendant a new trial ruling,

inter alia, that there was no showing of any violation of the defendant's constitutional right to an impartial jury.

The defendant argues, on several grounds,[1] that the court erred in refusing to grant the defendant's motion for a new trial. We do not agree. "Where alleged juror misconduct claimed as prejudicial is known by the party *or* his counsel prior to rendition of a verdict, and no objection is made, nor the matter brought to the court's attention, the party cannot later assert the misconduct as grounds for a new trial." (Emphasis added.) *State* v. *Porter*, Kan. , 615 P.2d 146, 152 (1980), quoting *State* v. *Buggs*, 219 Kan. 203, 547 P.2d 720 (1976). "[W]here misconduct of jurors is first presented in the motion for new trial, an affirmative showing must be made that *both* defendant and his attorney were ignorant of the misconduct until after the trial. . . . The reason for the rule is that a defendant is not entitled to wait until the verdict is in, gambling on a favorable verdict, then seek a new trial if a verdict of guilty is returned. . . . Appellant's knowledge of the alleged misconduct prior to the conclusion of trial prevents its consideration when raised for the first time in the motion for new trial, even though appellant's counsel did not learn of it until after trial." (Emphasis added.) *State* v. *Brown*, 599 S.W.2d 498, 502 (Mo. 1980).

We do not agree with the defendant's contention that he was deprived of his right to the effective assistance of counsel. The defendant was told by his counsel not to talk to any juror during the trial; he knew that the conversation was improper; and, even though he was told by Mr. Flood to inform his counsel of the conversation, the defendant did not tell his attorney until after the verdict was reached.

We note that at the time of the conversation, there were two alternate jurors sitting on the defendant's jury, in addition to the twelve regular jurors. In an unattacked conclusion, the court

stated that "[a]ny prejudice arising from said conversation could have been remedied by the trial court's excusing [the involved juror] from further service as a juror on the defendant's case and replacing [him] with one of the alternate jurors."

Under the circumstances of the case, because the defendant knew of the improper communication with the juror, yet waited until after an unfavorable verdict was reached to raise the issue, we decline to find error.

There is no error.

In this opinion the other judges concurred.

FOOTNOTES

1 We note that the jury were fully apprised by the court on the issue of the effect which the defendant's intoxication could have had on their verdict. See General Statutes §53a-7. Nevertheless, they found that the defendant had the requisite intent. The defendant makes no claim that the court's charge with respect to the issue of the defendant's intoxication was deficient in any way. We set out the court's charge on the murder count with respect to that issue to show its comprehensiveness: "I have to point out to you at the outset that under our statute, intoxication is not a defense to a criminal charge, but evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate or negative an element of the crime charged. However, the burden remains with the state to prove beyond a reasonable doubt that the defendant, in spite of any intoxication, if you find any, had the capacity to and did form the intent to cause Valerie Vickers' death when he shot her. This is due to the basic rule that the state has the burden of proving all the elements of the crime charged, including intent beyond a reasonable doubt. So, I mention this to you because I don't want you to think that the defense has the burden of proof on this. The burden overall is upon the state.

"Now, intoxication under the statute means a substantial disturbance of mental or physical capacities resulting from the introduction of substances into the body. Intoxication, whether induced by the use of intoxicating liquor or drugs, becomes significant only when it has proceeded so far that it has affected the operation of the

defendant's mind to a point where it has caused a substantial disturbance of mental or physical capacities, caused by introducing such intoxicating liquor or drugs into the body. The resulting substantial disturbance of the mind or body must be such as to render the defendant incapable of forming an intent to cause the death of another person as required by the murder statute. In other words, the substantial disturbance must be of such a degree as to nullify the defendant's conscious objective to cause the result or to engage in the conduct forbidden by the murder statute. Only when and if the intoxication has reached that point does it negative the existence of the criminal intent required for murder. If it fails to reach such a point, it does not negative the existence of the criminal intent, and you may find that he had such criminal intent. On the other hand, if it does reach that point, then you must find that he did not have the necessary criminal intent to commit murder.

"As we all know, the condition of intoxication may vary in degree according to the amount and character of the liquor or drug taken, the temperment and physical characteristics of the person who takes either or both, the lapse of time between their taking and the commission of the alleged crime and other circumstances which you may reasonably consider that I may not have mentioned, but were mentioned partly through the testimony of Dr. Stollman.

"An individual may or may not show in his behavior the present effects of liquor or drugs which he has taken and yet, still retain his faculties sufficiently to reason, to know what he is about, and to form and carry out an intent to violate the law. It is only when he is so substantially under the influence of liquor or drugs that at the time the crime was committed, he was unable to have a conscious objective to cause the result or to engage in such conduct as the law forbids. Under the murder statute then, you may find he did not have the necessary intent required by the statute. Thus, as to the third element of the crime of murder, namely, the intent to cause the death of another person, even if you are to find the defendant may have become intoxicated to some degree, if you find that the state has proved the defendant was still capable of forming an intent to cause the death of another person and that he had such intent at the time the crime was committed, and if you find the state has proved all of the other essential elements of the offense, you must find the defendant guilty of murder as charged.

"On the other hand, if you find that the state has failed to prove that at the time of the commission of the offense, the defendant was capable of forming a specific intent mentioned, and also has failed to prove that he had such specific intent, you must find the defendant not guilty of murder."

2 Trooper David Horan arrived at the Stankowski residence at approximately midnight, rode with the defendant to the barracks, and stayed with him during the time in question.

3 The court continued: "The record should reflect the fact that in arriving at this conclusion, the court has taken into account the fact that he was on the stretcher and handcuffed for at least a portion of this time. However, since the time period involved - although there was testimony of time that stretched it out to an hour, clearly the mathematical computation puts it somewhere in the vicinity of twenty-five to thirty minutes. This court cannot say that the actions of the police in that situation were unreasonable or coercive, particularly in light of the accused's conduct when the police arrived at the scene where he was threatening to take his life and threatening the lives of other people and so forth. Consequently, given the totality of the circumstances and the applicable rules the court stated for the record, it first finds that the statements made were voluntary. This finding is made under the totality of the circumstances then and there existing, including those - the mental and physical state of the defendant including his voluntary ingestion of alcohol."

4 He soon thereafter stated: "As I said, even under the most broad interpretation of the rule, I just can't allow this boy to testify. Believe me, if I felt there was any way that I could I would." The rule to which the trial court judge referred was that of *State v. Siberon*, 166 Conn. 455, 352 A.2d 285 (1974), which was cited with approval in *State v. Rodriquez*, Conn. (41 Conn. L.J., No. 44, pp. 12, 14) (1980).

5 Although the printed record cannot, itself, fully demonstrate the demeanor, maturity, responsiveness or abilities of the child, i.e., those factors which went into the trial court's determination, the transcript regarding the examination of the child witness adequately supports the trial court's conclusion. Portions of that transcript include the following:

"By Mr. Redway [State's Attorney]:

Q. Stephen, how do you feel today?

A. Good.

Q. Stephen, you told us how old you were and you said you were six years old, right?

A. Yes.

Q. Do you know your birth date, Stephen?

A. The second.

Q. The second of what? Do you know what date your birthday falls on?

A. No.

Q. Stephen, you said you went to kindergarten?

A. Yes.

Q. What is your teacher's name?

A. Miss Warzecha.

Q. What do you do when you go to kindergarten?

A. Play.

Q. Do you have fun playing?
A. Yes.
Q. Do you do anything else while you are in kindergarten?
A. Yes.
Q. What is that?
A. See-saw.
Q. Do you do any writing when you are in kindergarten?
A. Yes.
Q. Do you know how to write your name?
A. Yes.
Q. Do you know the alphabet?
A. Yes.
Q. Can you say the alphabet for me?
(Witness responds by reciting alphabet, but most letters are unintelligible.)
Q. Do you know how to count?
A. Yes.
Q. Can you count up to twenty for me?
(Witness counts to twenty, but most numbers are unintelligible.)
Q. You indicated or you told Mr. Peters that you lived on Falls Road?
A. Yes.
Q. Do you know the name of the town that you live in?
A. No.
Q. Who lives with you at Falls Road?
A. Gary.
Q. Anybody else live with you?
A. Frankie and Grandma.
Q. Anybody else live with you there?
A. Debbie.
Q. Debbie lives with you, too?
A. Yes.
Q. Anybody else live with you at that location?
A. No.
Q. Do you to go church, Stephen?
A. Yes.
Q. You do?
A. Yes.
Q. When do you go to church, Stephen?
A. Friday.
Q. Where do you go to church, Stephen?
A. I don't know.
Q. How often do you go to church, Stephen?
A. One week.
Q. Do you go to church every week?

A. No, just one week.

Q. Just one week?

A. Yes.

Q. Do you know how many times you have been to church, Stephen?

A. One time.

Q. Just one time you have been in church?

A. Yes.

Q. Who did you go to church with?

A. Frankie and Gary.

Q. Do you go to Sunday School?

A. Yes.

Q. You do?

A. (Nodding affirmatively.)

Q. Do you go every week?

A. Yes.

Q. What is your Sunday School teacher's name?

A. Miss Warzecha.

Q. Not kindergarten. I am talking about church school. Do you go to church school?

A. Yes.

Q. Where is that?

A. Falls Road.

Q. Is that where the church is?

A. Yes.

Q. Is the church near your home, Stephen?

A. Yes.

Q. How far is it from your home?

A. A little ways.

Q. Do you know the name of the church?

A. (Nodding negatively.)

Q. You don't know?

A. No.

Q. Do you believe in God?

A. Yes.

Q. Who taught you to believe in God?

A. My Grandma.

Q. Do you know what is is to tell a lie, Stephen?

A. No.

Q. Do you know what would happen to you if you told a lie?

A. Yes.

Q. What would happen to you?

A. You 'pologize (sic).

Q. I don't understand that word, Stephen. Can you state it again?

A. 'Pologize.

Q. You apologize, is that what it is?

A. Yes.

Q. What do you mean by that, Stephen?

A. Like sometimes you lie.

Q. What happens when you lie?

A. You 'pologize.

Q. What does that mean, Stephen? I don't understand that word. Sometimes I have trouble understanding things.

A. Like you lie.

Q. Do you mean that once you lie, you have to say you're sorry?

A. Yes.

Q. But you don't know what a lie is, Stephen?

A. (Nodding negatively.)

Q. Would anything happen to you, Stephen, if you lied?

A. Yes.

Q. What would that be?

A. I don't know.

Q. Do you know why you are in court, Stephen?

A. Yes.

Q. Why are you in court?

A. To ask the truth.

Q. Do you know what you are supposed to say when you come into court?

A. (Nodding affirmatively.)

Q. What is that, Stephen?

A. I don't know.

Q. You like Gary, don't you?

A. Yes.

Q. You like Frankie?

A. Yes.

Q. If Gary or Frankie asked you to say something, would you say it?

A. Yes.

Q. Why? Because you like them?

A. Yes.

Q. If they told you it would be okay to tell a lie, would you do it?

A. No.

Q. You wouldn't do it then?

A. No.

Q. Why not?

A. I don't know.

Q. Stephen, when was the last time you were at school?

A. I don't know.

Q. Stephen, have you ever seen me before?
A. Yes.
Q. Where did you see me before?
A. Outside.
Q. Ever see Mr. Peters before?
A. Yes.
Q. Where did you see him before?
A. I don't know.
Q. Stephen, Mr. Peters asked you some questions before. Is that right?
A. Yes.
Q. Do you remember the questions he asked you?
A. Yes.
Q. Did he ever ask you those questions before?
A. Yes.
Q. Did he ask you those questions before many times?
A. Yes.
Q. Can you tell me how many times?
A. All day.
Q. Stephen, do you know how long ago Christmas was?
A. Yes.
Q. Do you remember Christmas?
A. Yes.
Q. Why do you remember Christmas, Stephen?
A. Before I like it.
Q. Do you remember how long ago that was?
A. Yes.
Q. How long was that?
A. A long day.
Q. Do you remember when this thing happened with Gary?
A. Yes.
Q. Did that happen before Christmas or after Christmas?
A. After Christmas.
Q. Stephen, what else happens to people when they tell lies?
A. I don't know.
Mr. Redway: No further questions.
The Court: Mr. Peters [defendant's attorney].
By Mr. Peters:
Q. Stephen, if the Judge allowed you to testify, would you lie?
A. No.
Q. Do you remember something that you did last summer?
A. Yes.
Mr. Peters: No further questions, your Honor.
By the Court:
Q. Stephen, do you know what the word testify means?
A. No.

Q. Why do you remember Christmas?

A. I don't know.

Q. Do you get presents at Christmas time?

A. Yes.

Q. Do you remember what present you got last Christmas?

A. Yes.

Q. What did you get?

A. A bike.

Q. What kind of bike, three wheels or two wheels?

A. Three wheels.

Q. Do you remember going to church?

A. Yes.

Q. Do you remember the name of the church?

A. No.

Q. Who is the man or lady who runs things at the church, do you remember?

A. No.

Q. Do you have friends in kindergarten?

A. Yes.

Q. Who is your best friend?

A. Mark.

Q. Do you know where Mark lives?

A. No.

Q. Do you know Mark's last name?

A. Mark Shasso (sic).

Q. How old is Mark?

A. Six.

Q. Do you know the name of the people who live next door to you on Falls Road?

A. No.

Q. Do you know what happens to you when you tell a lie?

A. Yes.

Q. What is that?

A. You 'pologize.

The Court: All right, no other questions.

Mr. Peters: I have none, your Honor.

Mr. Redway: I have no further questions."

6 The court stated: "The last question which you sent out reads as follows: 'Does the jury have to reach a unanimous decision on the first or more serious charge before considering the lesser charge?'"

"The answer to the question is yes. You make a decision on the greater charge first and then you go on to the lesser charge, if you decide that the accused is not guilty of murder in the first degree on the first charge. Then and only then will you consider the lesser included charge.

"Now, there is something else at this point that I do want to say to you because of what your question implies. I want to point out to you that although the verdict to which each juror agrees must be, of course, his or her own conclusion and not a mere acquiescence in the conclusions of their fellow jurors, yet, in order to bring twelve minds to a unanimous result, all of the jurors should examine with candor the questions submitted to them and with due regard and in deference to the opinion of the other jurors in conferring together, the jury ought to pay proper respect to each other's opinions and listen with candor to each other's argument. If much the larger number of the panel are for a conviction, a dissenting juror should consider whether the doubt in his or her mind is a reasonable one which makes no impression upon the minds of so many men and women equally honest and equally intelligent as himself or herself, who have heard the same evidence with the same attention and with equal desire to arrive at the truth and under the sanction of the same oath. On the other hand, if the majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the conclusions of the judgment which is not concurred in by most of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellow jurors.

"With that, ladies and gentlemen, I am going to send you back to the jury deliberating room. I will give the clerk the page with the question and again, it is to remain a part of the record of this case. You may now retire."

7 The defendant also objected to the timeliness of giving the charge since the jury had not reported a deadlock. Although such a charge "has *customarily* been deffered until after a disagreement has been reported"; (emphasis added) *State v. Walters*, 145 Conn. 60, 64, 138 A.2d 786, cert. denied, 358 U.S. 46, 79 S. Ct. 70, 3 L.Ed.2d 45 (1958); a reported deadlock is not a prerequisite to giving the charge. In this case, even though a deadlock had not been reported, the jury had been deliberating for two and one-half days, and had sent the court a question which indicated they were having a problem with the concept of unanimity with regard to the more serious offense.

8 After the trial court discussed the first two elements of the crime of murder, it stated: "Now, the third element which the state must prove, and that is obviously a crucial element in this case, is that the person causing the death of the other person must have done so with intent to cause such death. In other words, the state must prove beyond a reasonable doubt that the accused shot Valerie Vickers with the intent to cause her death.

"Now, intent is a mental process. A person's intentions may be inferred from his conduct. Every person under the law is presumed to intend the natural and necessary consequences of his acts. It is often impossible and never necessary to prove criminal intent by direct

evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was. That testimony you can believe or not, according to whether or not you feel it warrants belief, but no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or intention was at any given time, aside from the person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his purpose or intention was. To draw such an inference is not only permitted, but it is also the duty of a jury, provided, of course, the inference drawn is a reasonable one, as I have previously pointed out to you."

The defendant also takes issue with the charge given on manslaughter, which reads as follows: "Now, intent, as I have already explained to you, is a mental process. I have described to you how that process operates and how it may or may not be proved by the state. The person's intention may be inferred from his conduct. Here, I am, in effect, repeating what I have already told you and that is to say, every person is presumed to intend the natural and necessary consequences of his acts. It is often impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have defined that term for you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

"A person may take the stand and testify directly as to what his or her purpose or intention was or was not. That testimony, as I have told you, can be believed by you or not, according to whether or not you feel it warrants belief, but no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his purpose or intention was at the time the conduct was engaged in."

During their deliberations, the jury requested the trial court to instruct them again on the definitions of murder and manslaughter. In response, the court thereafter reinstructed them, and gave almost verbatim its earlier charges with respect to the two crimes.

9 In *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), the United States Supreme Court held that a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the due process clause of the fourteenth amendment, because a reasonable juror could

interpret this instruction as a burden-shifting presumption, like that invalidated in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975), or as a conclusive presumption, like those invalidated in *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978), and *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

10 With respect to the crime of murder, the trial court in *State v. Arroyo* charged: "'[I]ntent is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural probable consequences of his acts.... It is often impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence as I have explained that term to you. Now, as to intent which a person may have, that is what a person's purpose, design, intention was is necessarily a matter of inference. A man may take the witness stand and testify directly as to what his purpose or intention was, and that testimony you can believe or not, according to whether or not it warrants belief or not. But no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention or certain knowledge. The only way in which a jury can determine what a person's purpose or intention was, at any given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his purpose or intention was. Now to draw such an inference is not only the privilege, but it is also the duty of a jury, provided, of course, the inference drawn is a reasonable one and a logical one. Now, one that uses a deadly weapon upon a vital part of another will be deemed to have intended the probable result of that act, and from such a circumstance a proper inference may be drawn in some cases that there was the intent to cause the death. Any inference that may be drawn from the nature of the weapon and the manner of its use, is an inference of fact to be drawn from the jury upon consideration of these and other circumstances in the case.'" *State v. Arroyo*, Conn. (41 Conn. L.J., No. 39, pp. 6, 7-8) (1980).

11 The defendant's father, on the day of said conversation, said to the defendant, "You know you're not suppose to talk to a juror."

12 Our disposition of this issue does not require us to reach all of the claimed bases of error.

APPENDIX (2)

Order of Connecticut Supreme Court Denying Motion for Rehearing Dated May 28, 1981

No. 9204

State of Connecticut	:	Supreme Court
v.	:	State of Connecticut
Gary Stankowski	:	May 28, 1981

ORDER

The defendant's motion to reargue having been presented to the court, it is hereby ordered DENIED.

By The Court,

/s/ Donald H. Dowling
CHIEF CLERK

Notice
Joseph Keefe
John T. Redway, State's Attorney
Ernest J. Diette, Jr., Assistant State's Attorney
Edward J. Peters, Jr.
Clerk, Superior Court, Middlesex
May 28, 1981

APPENDIX (3)

Relevant Portions of Charge to Jury

Portions of Trial Court's Charge to Jury on May 16, 1978, May 17, 1978 and May 18, 1978

The jury in the instant matter was initially charged in the late morning of May 15, 1978 and subsequently received further instructions until they reached a verdict over a two and one half day period on May 18th. The Trial Court charged on the element of intent after indicating that the information read:

> "The Grand Jury within and for said County, accuses Gary Stankowski, Falls Road, East Haddam, Connecticut, of murder, and charges that at the town of East Haddam, on the 25th day of August, said Gary Stankowski, with intent to cause the death of another person, namely, Valerie Vickers, did cause the death of such person by means of a deadly weapon, to wit; a shotgun in violation of Section 53a-54a, Subsection A of the General Statutes." (T. pp. 22-23, 5/16, 5/17, 5/18/78)

The Court further charged on the statute in question as follows:

> "Our statute concerning murder, which is the one that I just referred to by number, as far as it is pertinent to this case, reads in part as follows: I quote now the pertinent sentence from the statute which you will be concerned with, 'A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person.'" (T. p. 23, 5/16, 5/17, 5/18/78).

The Court continued with an analysis of the statute as follows:

> "Now, there are three essential elements in the crime of murder. First, the death of one person must be caused by another person. Secondly, the person causing the death must be of sound mind. That is to say, must be legally sane. Third, the person causing the death of the person must have done so with the intent to cause the death." (T. p. 23, 5/16, 5/17, 5/18/78)

The Trial Court then discussed the first two elements of the crime charged and then instructed on the third issue of intent, a portion of which is as follows:

> "Now, the third element which the State must prove, and that is obviously a crucial element in this case, is that the person causing the death of the other person must have done so with intent to cause such death. In other words, the State must prove beyond a reasonable doubt that the accused shot Valerie Vickers with the intent to cause her death.
>
> Now, intent is a mental process. *A person's intentions may be inferred from his conduct. Every person under the law is presumed to intend the natural and necessary consequences of his acts.* It is often impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was. That testimony you can believe or not, according to whether or not you feel it warrants belief, but no witness can

be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or intention was at any given time, aside from the person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his purpose or intention was. *To draw such an inference is not only permitted, but it is also the duty of a jury, provided, of course, the inference drawn is a reasonable one, as I have previously pointed out to you.* [emphasis added] (T. pp. 27-28, 5/16, 5/17, 5/18/78)

The Trial Court repeated the critical portion of its charge on intent in instructing the jury on the lesser included offense of Manslaughter. The portion of instruction referred to is as follows:

"Now, intent, as I have already explained to you, is a mental process. I have described to you how that process operates and how it may or may not be proved by the State. The person's intention may be inferred from his conduct. Here, I am, in effect, repeating what I have already told you and that is to say, *every person is presumed to intend the natural and necessary consequences of his acts.* It is often impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I have defined that term for you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

A person may take the stand and testify directly as to what his or her purpose or intention was or was not. That testimony, as I have told you, can be believed by you or not, according to whether or not you feel it warrants

belief, but no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his purpose or intention was at the time the conduct was engaged in. (T. pp. 34-35, 5/16, 5/17, 5/18/78) [emphasis added]

The Trial Court, later in its instructions, summarized as follows:

"For a case of this nature, it seems to me the issues are fundamentally clear. There is not much disputed fact here. Who did what to whom, that is pretty much conceded here. The question is why. That is really the issue. *It is for you to decide whether the Defendant had such an intent at the time of the shooting and whether it was intended that he caused the death of Valerie Vickers, or whether it was intended that he only cause a serious physical injury, or as the defense claims, with regard to the testimony of her grabbing the gun and that it was pure accident and that he had no intention of any kind to cause any harm, neither death nor serious physical injury.* If you find that he had a sufficient intent to cause serious physical injury to Valerie Vickers and that she died as a result of the acts of the Defendant, then you must find him guilty of manslaughter in the first degree. If you do not so find, then he is not guilty of that charge either." (T. pp. 41, 42, 5/16, 5/17, 5/18/78) [emphasis added]

The jury during their deliberations, after approximately two days of deliberation, inquired of the Trial Court as follows:

> "Judge Naruk, within the charge to the jury, can you re-read and expand on the definitions of murder and manslaughter in the first degree, specific ly the components making up each charge." (T. p. 67, 5/16, 5/17, 5/18/78)

In response thereto, the Court charged in part on the elements of murder, and particularly in part on the element of intent as follows:

> "The third element which the State must prove, that is, the person causing the death of the person must have done so with intent to cause the death. In other words, the State must prove beyond a reasonable doubt that the accused shot Valerie Vickers with the intent to cause her death. Now, intent is a mental process. A person's intention may be inferred from his conduct. *Every person is presumed to intend the natural and necessary consequences of his act. It is often impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can be proved only by circumstantial evidence, as I explained the term circumstantial evidence to you previously.*
>
> Now, what a person's purpose or intentions has been is necessarily very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was. That testimony you can believe or not, according to whether or not it warrants belief, but no witness can be expected to come up here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or

intention was at any given time, aside from that own person's testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his purpose or intention was. *It is not only a privilege to draw such an inference, but it is also the duty of a jury, provided, of course, the inference drawn is a reasonable one.* In this case, therefore, it is part of your duty to draw all reasonable inferences from the conduct of the accused in light of the surrounding circumstances as to what purpose or intention was in his mind at various times, and most importantly, in this case, at the time he shot Valerie Vickers, if you find that he did, in fact, shoot her....

In considering the meaning of this third element, that is, the intent to cause the death of another person, you must keep in mind the definition of the word intentionally as defined in our Penal Code. This Section states that, 'A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." (T. pp. 70, 71, 72, 5/16, 5/17, 5/18/78) [Emphasis added]

The court went on to charge on the lesser included offense of manslaughter on the issue of intent charged, in part, as follows:

"Now, intent, as I have pointed out to you, is a mental process. I have described to you how that process operates and how it may or may not be proved by the State. The person's intention may be inferred from his conduct. Here again, I am repeating what I have already told you a moment ago. *Every person is presumed to intend the natural and necessary consequences of his acts.* It is often

impossible and never necessary to prove criminal intent by direct evidence. Ordinarily, intent can only be proved by circumstantial evidence, as I have previously explained that term to you.

What a person's purpose or intention has been is necessarily, as I mentioned, very largely a matter of inference. A person may take the stand and testify directly as to what his or her purpose or intention was or was not. That testimony can be believed or not according to whether or not you feel it warrants belief, but no witness can be expected to come here and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from those, infer what his or her purpose or intention was. (T. pp. 77, 78, 5/16, 5/17, 5/18/78) [Emphasis added]

The critical issue in the Stankowski trial was whether or not the taking of the victim's life was intentional or an accident and the Court so indicated in the Charge to the jury. The Trial Court charged:

"For a case of this nature, it seems to me the issues are fundamentally clear. There is not much disputed fact here. Who did what to whom, that is pretty much conceded here. The question is why. That is really the issue. It is for you to decide whether the Defendant had such an intent at the time of the shooting and whether it was intended that he caused the death of Valerie Vickers, or whether it was intended that he only cause a serious physical injury or as the defense claims, with regard to

the testimony of her grabbing the gun and that it was pure accident and that he had no intention of any kind to cause any harm, neither death nor serious physical injury. If you find that he had a sufficient intent to cause serious physical injury to Valerie Vickers and that she died as a result of the acts of the Defendant, then you must find him guilty of manslaughter in the first degree. If you do not so find, then he is not guilty of that charge either." (T. pp. 41-42, 5/16, 5/17, 5/18/78)

APPENDIX (4)

Petitioner's Motion to Reargue in the Connecticut Supreme Court Regarding the Failure to Decide Constitutional Issues

No. 9204

State of Connecticut	Supreme Court
v.	State of Connecticut
Gary Stankowski	May 19, 1981

MOTION TO REARGUE

The appellant, Gary Stankowski, moves to reargue the above entitled matter, pursuant to Sections 3111 and 3111A of the Connecticut Practice Book, for the reason that the Court in its decision reported in 42 Conn. L.J. No. 46, p. 5 (May 12, 1981), considering whether or not the Trial Court erred in excluding the testimony of a six year old child in Part III at pp. 11-12, did not rule upon the constitutional issues raised by the appellant, Gary Stankowski, and particularly the issues regarding exculpatory evidence and the right to present a defense.

DEFENDANT/APPELLANT

By /s/ Edward J. Peters, Jr.
Edward J. Peters, Jr.

By /s/ Joseph F. Keefe
Joseph F. Keefe

ORDER

The foregoing motion having been duly presented and heard, it is hereby GRANTED/DENIED.

BY THE COURT:

Dated_____1981 _____

Judge

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was mailed to John T. Redway, State's Attorney, P. O. Box 757, Middletown, Conn.; Ernest J. Diette, Jr., Assistant State's Attorney, 100 South Turnpike Road, Wallingford, Conn.; and Joseph F. Keefe, Esq., 179 Water Street, Torrington, Conn., on May 19, 1981.

/s/ Edward J. Peters, Jr.

Edward J. Peters, Jr.

APPENDIX (5)

Motion to Suppress a Portion of the Testimony of Trooper David Horan

Pursuant to Article 1, Section 8 of the Connecticut Constitution, and the 14th and 5th Amendments of the United States Constitution, the Defendant herein moves to Suppress the testimony of Trooper David Horan as the same relates to any of the statements made by the Defendant, Gary Stankowski between the hours of 0005 and 0115 on August 26, 1977. In support of said Motion, the Defendant relies upon the following facts:

1. On or before 0005, on August 26, 1977, the Defendant was taken into physical custody by the Connecticut State Police Department, handcuffed and strapped into a stretcher.

2. On or before said time as aforementioned, the Defendant was delivered into the custody of Trooper David Horan, and by the said Trooper David Horan and others, placed within the confines of an ambulance.

3. At or about said time, the Defendant, accompanied in the rear of the ambulance by the said Trooper David Horan, was taken to the Colchester barracks, wherein he was held in confinement for an undetermined period of time while the police were conducting their investigation into the death of one, Valerie Vickers.

4. At or about 0115 of August 26, 1977, it is the testimony of Trooper David Horan that he first warned the Defendant of certain rights, which rights were guaranteed to him under the Connecticut and United States Constitution as aforementioned.

5. Although the Defendant was in custody and under arrest, the police who had an affirmative duty to warn him of his Constitutional rights, failed to do so for one hour and ten minutes during which time it is alleged

that the Defendant, while his hands were handcuffed to his back and his body strapped to a stretcher, made certain damaging admissions, which admissions are now being offered against him.

6. It is further in evidence that the Defendant, at the time of his arrest was nineteen years of age, was suffering to some extent from the ingestion of alcohol, and was physically constrained both by handcuffs and stretcher straps in such a manner that it would deprive him of the opportunity to think clearly as to his own protection and to the protection of his rights.

WHEREFORE, THE DEFENDANT MOVES, that this Court Suppress any of the evidence relating to admissions or statements of the Defendant, made by the Defendant to Trooper Horan and others between the times of 0005 hours on August 26, 1977, and 0115 hours on said date.

RESPECTFULLY SUBMITTED
DEFENDANT
GARY STANKOWSKI

By Edward J. Peters, Jr.
His Attorney

Filed April 20, 1978.

ORDER

The above Motion to Suppress a Portion of the evidence offered by Trooper David Horan, having been heard, is hereby DENIED.

BY THE COURT (Naruk,J.)

Michael Kokoszka
Temp. Asst. Clerk

April 21, 1978.
Record Conn. Sup. Ct., pp. 2-4.

APPENDIX (6)

Statements Trooper Horan Read To Jury Over Petitioner's Objection

(Trooper Horan called by the State on direct examination)

A. My notes indicate, "Everything works out badly for me. Kill me, man. Shoot me, man. You are going to have me arrested for the rest of my life. Shoot me. I'd rather die. You guys arrested me for murder. I want to die. I don't care if you lock me up forever. Please, man, I didn't kill nobody. You guys are all assholes. I will blow your fucking brains out. I am going to the Pardon Board. They will let me out and I will have a clean record. Then I will blow all your fucking brains out, especially Trotochaud, that asshole." (T. p. 43, 4/25/78)

A. "If you're going to accuse me of murder, please shoot me in the back of the head. No one is ever going to believe me. I didn't do anything. It didn't happen. Shoot me, shoot me. I love that girl, I loved Val. I loved that girl. Shoot me, shoot me. Please, Officer, kill me. Know what I'm so worried about, I have a record for disorderly conduct and using a car without the owner's permission. You are locking me up forever. I want to die. Shoot me. I love Val. Punch me, punch me. Hit me right between the tits. I swear, man, just hit me." (T. p. 44, 4/25/78)

A. "Where is the girl I shot, Val? If she is dead, you might as well kill me. Her brother will get me. He hated me. I didn't do it on purpose. It was an accident. I killed a girl. You have got a gun, please shoot me. You don't know how I feel. I tried so hard to please my family and everything I do is a failure. That's why I don't care if you kill me. I seen the gun go off. I seen her face go blue. I saw her eyes open up and die. I didn't do it on purpose." (T. p. 48, 4/25/78)

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-142

In The
Supreme Court of the United States

OCTOBER TERM, 1981

GARY STANKOWSKI
Petitioner

vs.

STATE OF CONNECTICUT
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ERNEST J. DIETTE, JR.
Assistant State's Attorney
100 South Turnpike Road
Wallingford, CT 06492

Counsel for the
State of Connecticut

REASONS FOR DENYING THE WRIT

1. THE CONNECTICUT SUPREME COURT DID NOT ERR IN FINDING THAT THE JURY CHARGE HEREIN, ALTHOUGH SAME DID CONTAIN THE PHRASE CONDEMNED IN SANDSTROM v. MONTANA, 442 U. S. 510 (1979), DID NOT, WHEN READ AS A WHOLE, IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE PETITIONER OR CONSTITUTE A CONCLUSIVE PRESUMPTION.

In the wake of this Court's decision in Sandstrom v. Montana, 442 U. S. 510 (1979), appellate courts such as the Supreme Court of the State of Connecticut have been left to determine, on a case-by-case basis, whether the jury charges in the respective cases, when read as a whole, constitute either the burden-shifting or conclusive presumption difficulties enumerated in Sandstrom, supra.

In the absence of further explication by this Court of the principles found in Sandstrom, supra, the lower courts have also been left to decide whether that case should be applied in a talismanic fashion, such that any "specific intent" case must be reversed any time the suspect Sandstrom phrase about a person necessarily intending the natural consequences of his actions is found, or, in the alternative, whether other portions of the jury charge which help to modify or explain the effect of the presumption can be weighed, in an effort to determine the overall impact of the charge on the mind of the average juror.

As indicated in the Petitioner's Brief, p. 13, the Supreme Court of Connecticut has taken the latter, more reasonable approach outlined above by proceeding on a case-by-case basis, to evaluate various factors, such as the specific charge of which the defendant was found guilty; the extent to which specific intent was a real issue in each case; and the ameliorative impact of other phraseology in the charge which might provide a different context to the overall impact on the average, reasonable juror.

That approach was taken in the present case and the Supreme Court of Connecticut weighed the various factors and found that the charge, when read as a whole, simply did not compel the jury which heard Petitioner's case to reach any specific conclusion.

Unless the Court wants to act as a reviewing court on this, as well as undoubtedly hundreds of other state and federal court applications of the Sandstrom decision, it is respectfully suggested that certiorari simply be denied in the present case.

If, on the other hand, the Court is desirous of an opportunity to further explicate its own decision in Sandstrom, such as rejecting the "talismanic" approach which defendants across the country have called for, perhaps this case might serve as an appropriate vehicle.

The respondent is confident that, should certiorari be granted in this matter, the well-reasoned and thorough approach taken by the Supreme Court of

Connecticut will prevail. That evaluative procedure, indeed, might serve as a guide to other state and federal appellate courts presently puzzling over the most appropriate manner in which to apply the Sandstrom principle.

II. THE CONNECTICUT SUPREME COURT'S EVIDENTIARY RULING ON THE COMPETENCY OF A SIX-YEAR-OLD BOY TO TESTIFY DOES NOT REPRESENT A FEDERAL QUESTION APPROPRIATE FOR DETERMINATION BY THIS COURT ON CERTIORARI.

While the Respondent will not in any way dispute the general line of cases, such as United States v. Nixon, 418 U. S. 683, 41 L.Ed. 2d 1039, 94 S.Ct. 3090 (1974), which speak of the "compulsory process" guarantees of the Constitution and the right of a defendant to present his case as he so desires, the fact remains that no decision has been cited which eliminates the traditionally discretionary responsibility of a trial court to test the competency of a questionable witness and to deny the opportunity to testify to those who simply fail to meet the minimal standards established to qualify an individual as a competent witness.

In a situation such as this, it should not be forgotten that it is the trial court alone which had the opportunity of hearing the testimony of the prospective child-witness outside the presence of the jury; was able to observe his demeanor on the stand and, possibly, to observe distractions

or hesitancies which a transcript cannot reveal. In recognition of this advantage, trial courts have traditionally been granted great deference in rendering their discretionary decisions on the competency issue.

In the present case, the Petitioner is unable to cite any reason why this basic evidentiary ruling in a state court trial should be catapulted into a federal question of Constitutional dimension.

III. THE CONNECTICUT SUPREME COURT DID NOT ERR IN REFUSING TO EXTEND THE PRINCIPLE OF MIRANDA v. ARIZONA, 384 U. S. 436 (1966), BY PLACING AN AFFIRMATIVE DUTY ON POLICE TO WARN AN INCOHERENT AND BABBLING SUSPECT THAT HIS SPONTANEOUS UTTERANCES MIGHT BE USED AGAINST HIM.

Since the Petitioner was subsequently to take the stand and testify that the shooting of Valerie Vickers was done by him accidentally, it is difficult to divine precisely what prejudice was done to his cause by the introduction of various statements, the basic thrust of which was that the shooting had been an accident for which the Petitioner was quite sorry.

The even simpler answer to the Petitioner's claim is that although he was in custody at the time he made his statements or "babblings," these were not made in response to any interrogation conducted by the police but were, rather, the rambling,

voluntary and unsolicited comments of the Petitioner. In short, there was no duty on the part of the police to stop the Petitioner from talking in such a rambling, somewhat incoherent, fashion.

This Court's decision of Rhode Island v. Innis, 100 S.Ct. 1682 (1980) did much to dispel the notion that what occurred here was "interrogation" of the Petitioner such that the Miranda warnings were required. In Innis, supra, this Court ruled that "interrogation" within the meaning of Miranda occurs when police subject a person in custody either to express questioning or to words and actions that the police should know are reasonably likely to elicit an incriminating response, given their knowledge of the suspect and any unusual susceptibility on his part to particular forms of persuasion. The Innis case involved a conversation between two officers in the front seat of a police cruiser in which a defendant was being transported, which conversation resulted in -- to their surprise -- an inculpatory, yet voluntary, response by the defendant.

It is difficult to believe that this Court, in light of the Rhode Island v. Innis, supra, and the general trend of this, and many other, Courts around the country to limit rather than expand the impact of the Miranda decision, would seize upon this third issue in the Petition as a chance to travel in the opposite, and retrogressive, direction.

CONCLUSION

For the reasons set forth in this brief, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATION

I, Ernest J. Diette, Jr., Attorney for Respondent, hereby certify that three (3) copies of the foregoing Brief in Opposition to petitioner's Petition for a Writ of Certiorari were mailed via U.S. Mail, postage prepaid, this 22nd day of October, 1981, to the following attorneys of record:

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